No.

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

COMMONWEALTH OF PENNSYLVANIA,

Petitioner,

vs.

KENNETH A. STEIN,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Pennsylvania

BRIEF IN OPPOSITION FOR RESPONDENT

RICHARD MAX BOCKOL
Attorney for Respondent
111 Presidential Boulevard
Suite 253
Bala Cynwyd, Pennsylvania 19004
(215) 667-2546

8231
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COUNTERSTATEMENT OF THE CASE

Dr. Kenneth A. Stein, D.P.M., was arrested on September 22, 1983, charged with miscellaneous violations of alleged Medicare fraud. The Informations charged that on March 8, June 24 and October 19, 1982 and on January 13, March 1 and March 9, 1983, Dr. Stein submitted a billing statement reporting code number "90005." That code number is used to describe the following out-patient services:

> Office visit, brief examination, evaluation and/or treatment . . . . . [$6.00] $8.00

The arrest revolved around incidents concerning services rendered for children of large families whose mothers or elder siblings had called the doctor's office in order to obtain prescriptions for orthopaedic shoes. Without such prescriptions, the children would have been unable to go for a fitting for their orthopaedic shoes to which they were entitled free of charge.

In all but rare instances, the children were either at school or ill and could not appear at the doctor's office. Dr. Stein did renew the prescriptions after seeing the mother or the sibling of the child in his office and only after having evaluated the child's record. New shoes, otherwise unobtainable, were provided the youngsters.

Dr. Stein then, filled out the appropriate Department of Public Welfare form, and coded his service as "90005."

The ninety-nine counts' magnitude is diminished if placed in the proper perspective of the three families involved.

1. Ruth Frazier cared for sixteen children. Some of her children were sick, others were in school. Thirteen of them needed

new shoes. She was unable to bring them. Dr. Stein, on March 9, 1983, after reviewing the children's charts and records, tendered prescriptions to her so that she could take her children to a shoe store to be fitted for free shoes. Dr. Stein billed for his services using the code 90005. This incident, charged as three counts apiece for each of the thirteen children, accounts for thirty-nine (39) of the total.

2. Linda Campbell, on March 1, 1983, was caring for seven children, aged four through fourteen. She testified that on the day she picked up the prescriptions, the children were in school and therefore did not accompany her (Notes of Testimony, Preliminary Hearing at pages 121-124):

> Q. Now, when you went to the West Norris Medical Center in '82 to see Doctor Stein, did you ever take the children with you? A. Sometimes.
>
> Q. Were they examined? A. I wouldn't say examined where he would put his hand like on his feet to examine them. He would like watch them walk from one end of the hall to the next and tell the technician to take them in the back and take x-rays.
>
> Q. How many times did that occur? A. Oh, most of the time, really.
>
> Q. And did you ever have occasion just to go call up and say "I want to pick up the prescriptions?" A. Well, I could go around while the kids are at school and say, "I would like to pick up their shoe slips now," yes.
>
> Q. Do you know how many times that

happened. A. I would say a couple of times, really.

Q. And did you go to him in March of this year? A. Yes.

Q. Did you take the children with you? A. No.

Q. Before March of this year when was the last time you had been to him? A. Oh, it was last year, right before Christmas.

Q. Did you have to sign a Medical Assistance invoice in March when you went? A. Yes.

Q. I show you C-8 and ask you if you recognize the signature on any of those invoices? A. Yes. This is my handwriting right here (indicating).

Q. And how many prescriptions did you obtain in March? A. Seven.

Q. Seven? A. Uh-huh.

Q. Did you have any children with you? A. No.

Q. Were any of those children with you? A. No.

Q. Were any of those children examined on that date? A. No.

Q. Were you questioned at all as to whether

or not the shoes were working or not working, or if there were any difficulties? A. No.

MR. DUNCAN: Cross-examine.

CROSS EXAMINATION
BY MR. BOCKOL:

Q. Do you recall seeing the doctor on that date? A. Yes.

Q. Did he hand you the prescriptions? A. Yes.

Q. Did he hand them to to you in his office or just outside of it. A. In the office.

Q. Did he have your children's files in front of him. A. I can't remember. Let me see . . . yes.

MR. BOCKOL: I have no further questions.

THE COURT: Anything further?

REDIRECT EXAMINATION
BY MR. DUNCAN:

Q. Mrs. Campbell, did he have the files on his desk? A. I'm trying to think now. Yes, he did, he had them.

MR. BOCKOL: Objection; he's cross examining his own witness.

BY THE COURT:

Q. Well, ma'am, I don't want you to guess. Do you know for a fact whether or not the files on your children were laying on his desk? A. Yes, he had the files on his desk because he don't know the children's names by heart.

MR. BOCKOL: May I ask one other question, Your Honor.

THE COURT: (Addressing Mr. Duncan) Are you finished?

MR. DUNCAN: Yes.

RECROSS EXAMINATION
BY MR. BOCKOL:

Q. Did he tell you the next time he would like to see your children? A. Yes.

MR. BOCKOL: Thank you.

All of the "Campbell" children's invoices were submitted as procedure code "90005" on or about March 1, 1983. Seven counts on each of the three Informations involve this one incident.

All seven of the Campbell children's invoices were submitted as procedure code 90005. Seven counts on each of three Informations involve this one incident, accounting for twenty-one (21) of the total.

3. Five Autrey children obtained prescriptions for thirteen

pairs of shoes at various times on March 8, June 24 and October 19, 1982 and on January 13, 1983, accounting for, pursuant to three counts for each pair, thirty-nine (39).

It should be noted that Dr. Stein was never advised that anything he was doing was improper, let alone illegal. He was simply arrested. The following General Provisions in the Medical Manual were disregarded by the Commonwealth in favor of prosecution.

> 1101.72 INVOICE ADJUSTMENT.
>
> The Bureau of Utilization Review, on a prepayment review, may either reject invoices downward to eliminate noncompensable items or items that are not medically necessary. Also, future invoices may be adjusted downward to correct previous overpayments discovered through postpayment invoice review.
>
> 1101.72 PROVIDER MISUTILIZATION AND ABUSE.
>
> If the Department's routine utilization review procedures indicate that a provider has been billing for services that are inconsistent with Medical Assistance regulations, unnecessary, inappropriate to patients' health needs or contrary to customary standards of practice, the provider will be notified in writing that payment on all his invoices will be delayed or suspended for a period not to exceed 120 days pending a review of his billing and service patterns. Some providers may have all of their invoices reviewed prior to payment. In addition, the provider's medical and/or fiscal records may

> be reviewed and copied and he may be asked to appear before one of the Department's Peer Review Committees to explain his billing practices. written notice of the Department's action to delay payment will also be sent to the PSRO, where applicable.

Prior to commencement of trial, the trial judge quashed nine (9) Autrey counts on three Informations which related to the nine pairs of shoes and subsequent bills for services rendered prior to January 1, 1983. That date is important because not until then had the Department of Public Welfare ever defined a "visit" as a "face to face" encounter between patient and doctor.

At trial, after the conclusion of the Commonwealth's evidence, demurrers were sustained to all the Frazier and Campbell counts. And after Dr. Stein's testimony, he was acquitted on the post-January 1, 1983 Autrey counts.

Even though the facts as to the quashed Autrey counts were submitted at trial and are on all fours with the facts and circumstances for the post-January 1, 1983 Autrey counts (and the Frazier and Campbell counts), the Commonwealth remains in pursuit, unconvinced that no criminal conduct occurred. The charges quashed pre-trial are identical to those of which Dr. Stein has already been acquitted. (Frankly, for those quashed counts, which are all pre-January 1, 1983 incidents, prior to *any* definitions in the code of regulations, the Commonwealth has an even greater burden. Here, by the grant of demurrers and the acquittal there has been a *de facto* judgment of acquittal on all charges).

ARGUMENT

AMBIGUITY IN A MEDICAID BILLING CODE VIOLATES DUE PROCESS WHEN THAT CODE'S LANGUAGE IS THE BASIS FOR CRIMINAL PROSECUTION.

The criteria in Rule 17 for granting certiorari have not been met in this case. The Commonwealth has misinterpreted *United States v. Larm*, 824 F.2d 780 (9th Cir. 1987) in attempting to show that a federal court of appeals has decided the due process question in a way in conflict with a state court of last resort.

Then Circuit Judge Kennedy described Dr. Larm's conduct in the context of the Medicaid code book provisions. He noted, that to prove Medicaid fraud, "the government must show a knowing false statement of material fact made in an application for benefits . . . . " The only way to review the "falsity" proof was to evaluate the language of the billing code itself.

Larm differed from Dr. Stein's circumstances, as follows:

1. Dr. Larm neither saw the patients nor personally rendered the services.

2. The code, 90040, was defined as a "brief examination, evaluation and/or treatment, same or new illness," and was additionally defined as "including a brief or internal history, examination, discussion of finding and/or rendering service."

3. Appearing on the same page as 90004 was 90030 defined as "Minimal service: injections, minimal dressings, etc., not necessarily requiring the presence of a physician." This code 90030 fit exactly the service rendered, *i.e.*, the routine administration of an allergy shot by Dr. Larm's nurse when Dr. Larm was not in the office.

4. Dr. Larm was informed and warned twice by a Medical Service representative that 90040 required the presence of a physician.

Dr. Larm's due process argument only related to the point that the code book had never been adopted as a rule in conformance with the Hawaii Administrative Procedure Act. Therefore, he argued, he lacked fair notice that his conduct was illegal. He was making no argument as to the ambiguity of the language of the code when discussing due process. The *Larm* case is inapposite and presents no conflict with the holding of Pennsylvania's Supreme Court. The facts and holdings are clearly distinguishable and unrelated.

Harris v. McRae, 448 U.S. 297, 100 S. Ct. 2671, 65 L. Ed. 2d 784 (1980) is cited by the Commonwealth in further support of its argument that a conflict exists. The case revolves around whether the Hyde Amendment violates the due process of indigent women who wish funding for medically necessary abortions. Its application to the criminal case at bar is more vague than some of the Medicaid code language in question.

Furthermore, there is no more stellar an example of the Pennsylvania regulations' ability "to punish good faith errors by Medicaid providers" than in the present matter. *See Colautti v. Franklin,* 439 U.S. 379, 99 S. Ct. 675, 58 L. Ed 2d 596 (1979).

CONCLUSION

Because the criteria of Rule 17 have not been met in this case, and for all of the above reasons set forth in this Brief in Opposition, the respondent, Kenneth A. Stein, respectfully requests that the Commonwealth's petition for writ of certiorari be denied.

Respectfully submitted,

RICHARD MAX BOCKOL
Attorney for Respondent